

DEC 21 1983

ALEXANDER L. STEVAS,
CLERK

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

DEBRA P. GRIMM,
Petitioner,

v.

Q. V. LEINART and ERNEST F. PHILLIPS,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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Attorney for Petitioner
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QUESTIONS PRESENTED

1. Whether a jury instruction that in order to award punitive damages under 42 U.S.C. §1983, the acts of the defendant must be intentional and willful, and not just negligent, will support an award of punitive damages under the standard announced by this Court in Smith v. Wade, ___ U.S. ___, 103 S.Ct. ___, 75 L.Ed.2d 632 (1983).

LIST OF PARTIES

All of the parties in the United States Court of Appeals for the Sixth Circuit are listed in the caption.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED.....	i
LIST OF PARTIES.....	ii
OPINIONS BELOW.....	2
JURISDICTION.....	3
STATEMENT OF THE CASE.....	4
REASONS FOR GRANTING THE WRIT.....	12
CONCLUSION.....	18
PROOF OF SERVICE.....	19
APPENDIX A.....	A-1
APPENDIX B.....	B-1
APPENDIX C.....	C-1
APPENDIX D.....	D-2

TABLE OF AUTHORITIES

Cases:

<u>Smith v. Wade,</u> U.S. ___, 103 S.Ct. ___, 75 L.Ed.2d 632 (1983).....	<u>passim</u>
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NO. _____

IN THE
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DEBRA P. GRIMM,
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v.

Q. V. LEINART and ERNEST F. PHILLIPS,
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PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE
AND THE ASSOCIATE JUSTICES OF THE
SUPREME COURT OF THE UNITED STATES

The Petitioner, Debra P. Grimm,
petitions for a Writ of Certiorari to
review the Judgment and Opinion of the

United States Court of Appeals for the Sixth Circuit entered April 19, 1983, and amended on September 23, 1983.

OPINIONS BELOW

The opinion of the Court of Appeals, entered April 19, 1983, (Appendix A, infra, p.A-1) is unreported. The order of the Court of Appeals granting the Petition for Rehearing, filed by the Petitioner herein, (Appendix B, infra, p.B-1) is unreported. The order of the Court of Appeals, entered September 23, 1983, amending its earlier opinion (Appendix C, infra, p. C-1) is unreported. The opinion of the Court of Appeals, as amended, is reported at 705 F.2d 179 (6th Cir. 1983). There was no formal opinion of the District Court; the charge to the jury of

the District Court (Appendix D, *infra*, p. D-1) appears at J.A. p. 211a-212a.

JURISDICTION

The judgment of the Court of Appeals was entered on April 19, 1983. A Petition for Rehearing was granted on June 6, 1983. On September 23, 1983, an order was entered by the Court of Appeals amending its earlier opinion of April 19, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

The facts of this case arise out of a political feud between Q. V. Leinart and Ernest F. Phillips, both County Commissioners for Anderson County, Tennessee, and the Superintendent of the Anderson County School System, Paul Bostic. In addition to being a County Commissioner, Mr. Phillips was also a criminal investigator for the District Attorney General in Anderson County and a deputy sheriff for Anderson County, Tennessee.

In October of 1980, Debra P. Grimm became a guidance counselor in the Anderson County School System at the Lake City High School. Among Ms. Grimm's duties was the maintenance of student records at the Lake City High School. Approximately

one and one-half months after she assumed her duties, Ms. Grimm was contacted by the Pupil Personnel Office regarding information in Mr. Leinart's records. Thereafter, she was instructed to bring the records of Mr. Leinart and Mr. Phillips to the Pupil Personnel Office in Clinton, Tennessee. On November 25, 1980, Ms. Grimm delivered the records as requested to the Pupil Personnel Office. The following morning Mr. Leinart and Mr. Phillips came to Ms. Grimm's office at the Lake City High School and requested to view their records. Mr. Phillips introduced himself as a criminal investigator for the Sheriff's Department and presented Ms. Grimm with a card identifying himself as a criminal investigator. Mr. Leinart and Mr. Phillips

further identified themselves as County Commissioners.

When Ms. Grimm advised Mr. Leinart and Mr. Phillips that their records had been taken to the central office, Mr. Phillips threatened to charge her with forgery if anything had happened to his records. Mr. Leinart and Mr. Phillips then informed Ms. Grimm that they were going to the central office to get their records, and they told her she could go with them then or they could take legal action and make her go later. Because of their status as law enforcement officers, Ms. Grimm agreed to go to the central office, but she insisted upon driving her own automobile. Mr. Leinart objected and instructed her to accompany them in their

car so they would arrive at the central office at the same time.

After arriving at the central office, Mr. Leinart and Mr. Phillips became embroiled in a heated altercation with the office personnel. Ultimately, Mr. Leinart and Mr. Phillips left the records office and drove Ms. Grimm back to the high school. Mr. Leinart and Mr. Phillips apologized to Ms. Grimm, referring to her as a victim in a bitter political feud. Ms. Grimm, however, was again told by Mr. Phillips that she would be charged with forgery if the ink date test proved the records had been recently changed.

Seven days later, on December 2, 1980, a formal request was submitted to the Tennessee Bureau of Investigation by the Anderson County District Attorney,

listing Ms. Grimm as the subject of an investigation into the alteration of Mr. Leinart's and Mr. Phillips' records. A Grand Jury for Anderson County likewise investigated the alleged alteration of the records. Ms. Grimm also was the subject of numerous newspaper articles concerning the incident.

In April 1981, Ms. Grimm instituted a civil action pursuant to 42 U.S.C. §1983, against Mr. Leinart and Mr. Phillips in the United States District Court for the Eastern District of Tennessee. In her complaint, she alleged that Mr. Leinart and Mr. Phillips, acting under color of state law, arrested her without probable cause, falsely imprisoned her, and damaged her reputation. On August 13, 1983, the jury returned a verdict in

favor of Ms. Grimm for \$100,000.00 in compensatory damages and \$20,000.00 in punitive damages. The award of compensatory damages was subsequently reduced by the Trial Judge to \$40,000.00, upon motion of Mr. Leinart and Mr. Phillips.

On September 29, 1981, Mr. Leinart and Mr. Phillips filed a notice of appeal. On appeal, they contended, inter alia, that the District Court erred in its instruction on punitive damages. The United States Court of Appeals for the Sixth Circuit affirmed in part and reversed in part. Specifically, the Court of Appeals affirmed the judgment below in all respects, except the judgment as to punitive damages. The Court of Appeals reversed the award of punitive damages,

holding that the District Court's instruction failed to distinguish the requisite level of culpability for compensatory damages from that for punitive damages.

Thereafter, Ms. Grimm filed a petition for rehearing with the Court of Appeals on the issue whether this Court's opinion in Smith v. Wade, ___ U.S. ___, 103 S.Ct. ___, 75 L.Ed.2d 632 (1983), (which was decided on April 20, 1983, the day following the decision by the Court of Appeals in this case) required the Court of Appeals to reconsider its reversal of the punitive damages award. The Court of Appeals granted the petition for rehearing and on September 23, 1983, entered an order amending its earlier opinion. By its order, the Court of Appeals held that the

District Court's instruction on punitive damages was inconsistent with and incorrect under the standard announced by this Court in Smith v. Wade. Accordingly, the Court of Appeals reaffirmed its reversal of the award of punitive damages.

This case is now before this Court on Ms. Grimm's petition for writ of certiorari on the issue of the award of punitive damages.

REASONS FOR GRANTING THE WRIT

This Court's decision on April 20, 1983, in Smith v. Wade, ___ U.S. ___, 103 S.Ct. ___, 75 L.Ed.2d 632 (1983), answered the important question whether a defendant's conduct, although not rising to the level of an intentional violation of federal law, may, nevertheless, be sufficient to trigger a jury's consideration of punitive damages in an action brought under 42 U.S.C. §1983. In that case, this Court held that "a jury may be permitted to assess punitive damages in an action under §1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." 75 L.Ed.2d at 651.

Additionally, this Court held that the threshold for punitive damages is not required to be greater than the underlying standard of liability for compensatory damages. 75 L.Ed.2d at 648-51.

In the instant case, the Court of Appeals reversed an award of punitive damages, apparently concluding that the District Court's jury instruction simultaneously stated both a lower and higher standard than required by Smith v. Wade, supra. In so concluding, the Court of Appeals gave an unjustified interpretation to the jury instruction, which undermines the holding of this Court in Smith v. Wade, supra.

In its charge to the jury, the District Court in this case instructed on punitive damages as follows:

Well, if you don't allow compensatory damages, then, of course, you can't allow punitive damages. But, if you allow compensatory damages, then, you may allow punitive damages if you feel the evidence justifies punitive damages.

Now, punitive damages are allowed where the conduct of the Defendant shows a disregard for the rights of the person injured, or the plaintiff.

In order to allow punitive damages, the acts of the defendant must be intentional and willful, and not just negligently. Must be more than negligence in order to justify punitive damages.

But, if you find that the defendants acted willfully, and intentionally, and thereby deprived plaintiff of her rights--civil rights, then you may--you don't have to--allow punitive damages in addition to the civil damages.

J.A. p. 211a-212a (Appendix D, *infra*, p. A-). Based on this instruction the jury awarded Ms. Grimm \$20,000.00 in punitive damages. The trial in this case

was completed prior to this Court's decision in Smith v. Wade, supra.

On appeal, the United States Court of Appeals for the Sixth Circuit concluded that the instruction failed to state that the wrongful acts must have been performed in malicious and wanton disregard of the plaintiff's constitutional rights. Consequently, the Court of Appeals reversed the award of punitive damages.

On April 20, 1983, the day following the Sixth Circuit's opinion in the instant case, this Court decided Smith v. Wade, ___ U.S. ___, 103 S.Ct. ___, 75 L.Ed.2d 632 (1983). As a result of that decision, Ms. Grimm petitioned the Court of Appeals for rehearing on the reversal of the punitive damages award. The Court of Appeals

granted the petition but reaffirmed its reversal of the punitive damages award.

Clearly the Court of Appeals treatment of the punitive damages award in the instant case should be reversed. In light of this Court's unambiguous pronouncement in Smith v. Wade, supra, such a reversal could easily be ordered per curiam by this Court. A fair reading of the District Court's jury instruction reveals that the standard announced meets, and even exceeds, the standard approved by this Court in Smith v. Wade, supra. Naturally, the District Court's instruction did not echo verbatim the standard set forth in Smith v. Wade, supra; that decision was not announced until after the trial in this case. Accordingly, it would be manifestly unjust

to permit the Court of Appeals' decision to stand and to deprive Ms. Grimm of her award merely because the District Court could not foresee the precise holding of this Court in Smith v. Wade, supra.

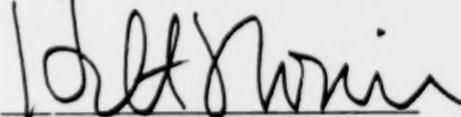
Beyond the manifest injustice that would result in not granting the writ prayed for, there are important policy reasons why the writ should issue. If the holding below is allowed to stand, other punitive damage awards may subsequently come under attack for no other reason than a judge failed to instruct a jury that it is unnecessary that a defendant have acted intentionally and willfully. Obviously, if a jury awards punitive damages under an instruction failing to state that reckless indifference will support an award of punitive damages, the omission is harmless

error, and the defendant should not be heard to complain. Consequently, the effect of the Court of Appeals' decision, which is a published opinion, is to open the door to frivolous appeals of valid awards of punitive damages and to deprive plaintiffs of their just awards under the guise of following this Court's decision in Smith v. Wade, supra.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decisions below should be reviewed by this Court and the petition for writ of certiorari should be granted.

Respectfully submitted

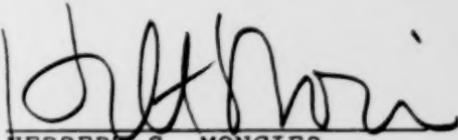


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PROOF OF SERVICE

I, Herbert S. Moncier, attorney for Debra P. Grimm, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 21 day of December, 1983, I served copies of the foregoing Petition for Writ of Certiorari to the Supreme Court of the United States, on J. Anthony Farmer, Esq., and David Stuart, Esq., attorneys for Respondents, by mailing copies of the same in duly addressed envelopes with postage prepaid.



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A-1
APPENDIX A

No. 81-5737

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DEBRA P. GRIMM,)
)
 Plaintiff-Appellee) On Appeal from
) the United States
 v.) District Court for
) the Eastern
 Q. V. LEINART and) District of
 ERNEST F. PHILIPS,) Tennessee
)
 Defendants-)
 Appellants)

Decided and Filed April 19, 1983.

Before: Keith and Contie, Circuit Judges
and Joiner.*

*Hon. Charles W. Joiner, U.S. District
Judge, Eastern District of Michigan,
sitting by designation.

Keith, Circuit Judge, delivered the opinion of the Court, in which Joiner, District Judge joined. Contie, Circuit Judge (pp. 9-10) filed a separate concurring opinion.

Keith, Circuit Judge. The defendants-appellants, Q. V. Leinart and Ernest F. Phillips, appeal from a district court judgment entered against them in this case. The plaintiff-appellee, Debra Grimm, brought this action pursuant to 42 U.S.C. § 1983. She alleged that the defendants, acting under color of state law, violated her civil rights. For the reasons set forth below, we affirm in part and reverse in part.

I.

The facts of this appeal arise out of a political dispute between the defendants, both County Commissioners, and the Superintendent of the Anderson County school system, Paul Bostic. In addition to being a county commissioner, defendant Phillips was also a criminal investigator for the state attorney general and a deputy sheriff for Anderson County, Tennessee.

The plaintiff is a guidance counselor at Lake City High School in the Anderson County school system. Among her duties are the maintenance of student

records. The records of former students in the county are generally kept in a central location at the pupil personnel office. However, some of the Lake City High School students records remained at the high school because of a lack of space in the downtown central location. Therefore, it was sometimes necessary to have records brought to the central office.

In November 1980, the plaintiff was instructed to bring the defendants' records to the pupil personnel office in Clinton, Tennessee. She took the records to the office as requested. The central records office is also the office of the superintendent of the county schools. The superintendent is the custodian of the records and has ultimate authority over them.

The next morning, the defendants and the school's principal came to the plaintiff's office. When they asked to see their records, she informed them that the records were at the central office.¹ The plaintiff testified that, upon hearing this, Phillips threatened to charge her with forgery if the records had been altered. Phillips also showed the plaintiff his business card which indicated that he was a criminal investigator for the State's Twenty-Eighth

¹The defendants had graduated almost twenty (20) years earlier.

Judicial District. The plaintiff testified that she interpreted the card as identifying Phillips as an officer of the law. The defendants then stated that they were going to the central office to see their records. They wanted the plaintiff to go with them. Leinart allegedly told her she could come with them now, or that they would take legal action to force her to do so later. Interpreting this as a threat, the plaintiff agreed to accompany them. The three of them travelled to the pupil personnel office in Leinart's car.

When they arrived at the central office, the plaintiff sought out Ms. Esther C. Tiller, an employee in the central office. The plaintiff told Tiller that the defendants wanted to see their records. Tiller retrieved the records and there was a great deal of discussion, much of it in a loud and boisterous manner. Tiller and the plaintiff became distraught. Superintendent Bostic came into the records office and asked the defendants to leave. After a brief confrontation, the defendants drove the plaintiff back to her school. The defendants apologized for the incident, telling the plaintiff that she was being used as a pawn in a political feud.

The plaintiff was subsequently investigated by the Tennessee Bureau of Investigation and the Anderson County

Grand Jury on the alleged alterations. She was also mentioned by name in several newspaper articles about the incident. Criminal charges brought against Phillips and Leinart for kidnapping were dismissed.

In April 1981, the plaintiff brought this civil action against the defendants. She alleged that the defendants, acting under color of state law, arrested her without probable cause, falsely imprisoned her, and damaged her reputation. In August 1981, the case was tried before a jury. On August 13, the jury found in favor of the plaintiff and awarded her \$100,000 in compensatory damages and \$20,000 in punitive damages. Upon a motion filed by the defendants, the district court granted a remittitur of compensatory damages in the amount of \$40,000.

II.

First, the defendants maintain that the district court should have granted a directed verdict or a judgment non obstante veredicto in their favor. "In ruling on the motion [for directed verdict] the trial court views the evidence in the light most favorable to the party against whom the motion is made." Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 696 n.6 (1962) (quoting 5 Moore's Federal Practice 2316 (2d ed. 1951)); Rockwell

International Corp. v. Regional Emergency Medical services of Northwest Ohio, Inc., 688 F.2d 29, 31 (6th Cir. 1982). The directed verdict is proper only when by so viewing the evidence, there is "a complete absence of pleading or proof on an issue or issues material to the cause of action or where there are no controverted issues of fact upon which reasonable men could differ." Rockwell, 688 F.2d at 31. This standard is also applicable to a motion for judgment n.o.v. Standard Alliance Industries, Inc. v. Black Clawson Company, 587 F.2d 813, 823 n.23 (6th Cir. 1978), cert. denied, 441 U.S. 923 (1979); O'Neill v. Kiledjian, 511 F.2d 511, 513 (6th Cir. 1975).²

²Judgment notwithstanding the verdict is not proper unless the evidence is such that there can be but one reasonable conclusion as to the proper verdict. It should not be granted if there is a conflict in the evidence, and credibility of evidence is not to be considered in passing on a motion for judgment.

Reeves v. Power Tools, 474 F.2d 375, 380 (6th Cir. 1973). See also Scharfenberger v. Wingo, 542 F.2d 328, 333 (6th Cir. 1976). The standard is the same for an appellate court. Scharfenberger, 542 F.2d at 333. O'Neill v. Kiledjian, 511 F.2d 511, 513 (6th Cir. 1975).

The defendants' argument is unsupported by the evidence. The plaintiff testified that (1) Phillips identified himself as a criminal investigator for the county sheriff's department, (2) both defendants coerced her into going with them under threat of legal process, (3) Leinart overruled her decision to drive her own car and instructed her to ride with them, and (4) the defendants held the plaintiff against her will for several hours. Given these allegations, we hold that the plaintiff presented sufficient evidence to raise a material issue of fact for the jury.

Second, the defendants contend that the district court improperly commented on the character of one of the defendants before the jury. It is argued that the judge's comment was reversible error because it effectively took the defendant's credibility away from the jury. We disagree.

During the direct examination of defendant Phillips, the following verbal exchange took place:

Q: You say "we" left. Who do you mean?

A: Mrs. Grimm, Danny Phillips and Mr. Leinart and myself. And a lady that works on the first floor was with us. She said a young couple

was in our office wanting to be married, and I invited Mrs. Grimm to go with us. And she came around.

THE COURT: Now, let's don't go into the marriage, and stuff like that. Tell him to keep his mind on the points.

MR. FARMER [DEFENDANT'S COUNSEL]: I am sorry, Your Honor. He has never been down here before.

THE COURT: He has been around. I can tell that.

No objection was made by defendant's counsel. Therefore, this court will reverse only if the court's comment amounted to plain error. Saltzman v. Fullerton Metals Co., 661 F.2d 647 (7th Cir. 1981); Newman v. A. E. Staley Mfg. Co., 648 F.2d 330 (5th Cir. 1981); Morreale v. Downing, 630 F.2d 286 (5th Cir. 1980). The judge's remark, while perhaps unwise, was not so prejudicial as to take the issue of Phillip's credibility away from the jury. Hence, we find no reversible error.

Third, the defendants argue that the amount of the court's remittitur was inadequate. In Manning v. Altec, 488 F.2d 127 (6th Cir. 1973), this court stated that it would review a trial court's order of remittitur only for abuse of discretion. "In order to determine whether there has been an abuse of discretion it

is necessary to examine the evidence on damages and the considerations which led the trial judge to order remission of a part of the verdict." Id. at 131. See also, Smith v. John Swafford Furniture Co., Inc., 614 F.2d 552, 553 (6th Cir. 1980).

We have examined the evidence on damages and the court's subsequent remittitur. We find no abuse of discretion. Although the jury's finding of liability is supported by the record, the jury's finding of damages was clearly not within "the maximum limit of a reasonable range." Smith, 614 F.2d at 553. However, the compensatory damages award finally ordered by the court is more than amply supported by the record.

Finally, the defendants attack the adequacy of the district court's instruction on punitive damages. The court instructed the jury as follows:

Now, punitive damages are allowed where the conduct of the defendant shows a disregard for the rights of the person injured, or the plaintiff. In order to allow punitive damages, the acts of the defendant must be intentional and willful, and not just negligently. Must be more than negligence in order to justify punitive damages.

But, if you find that the defendants acted willfully, and intentionally, and thereby deprived plaintiff of her rights - Civil rights, then you may - you don't have to - allow punitive damages in addition to the civil damages.

The district court's instruction properly states the defendants' conduct must be willful in order to justify the assessment of punitive damages. However, the instruction fails to inform the jury that the wrongful acts must have been done in "malicious and wanton disregard of [the] plaintiff's constitutional rights." Vetters v. Berry, 575 F.2d 90, 96 (6th Cir. 1978). Nor is the jury told that the purpose of punitive damages is to punish the wrongdoers and deter them and others from engaging in similar conduct in the future. Id. In sum, the district court's instruction failed to distinguish the requisite level of culpability for compensatory damages from the required level of culpability for punitive damages. This is reversible error. Johnson v. Husky Industries, 536 F.2d 645 (6th Cir. 1976). Accordingly, we reverse the award of punitive damages.

Normally, this would call for a remand to the district court for a new trial on all of the issues or at least on the issue of damages. Gasoline Products

Co., Inc. v. Champlin Refining Co., 283 U.S. 494 (1931), Thompson v. Camp, 167 F.2d 733 (6th Cir. 1948) (per curiam). However, this set of facts clearly indicates that before remand is ordered this court should consider the application of the remittitur doctrine. Dimick v. Schiedt, 293 U.S. 474 (1935).

This court has long since held that it has the authority to enter a remittitur order where the reversible error can be reasonably approximated to a definite portion of the damage award, or if the maximum effect of the error can be established. Central Paper Co. v. Southwick, 56 F.2d 593 (6th Cir. 1932); New York, C. & St. L.R. Co. v. Niebel, 214 F. 952 (6th Cir. 1914). Here, the reversible error was in the punitive damages instruction, and the maximum effect of the error may be reasonably fixed at \$20,000, the amount of the jury's punitive damages award. Therefore, the plaintiff should at least have the option of accepting the \$60,000, the amount of the jury's compensatory damage award after the remittitur granted by the trial judge. During oral argument before our court, plaintiff's counsel, when asked about the possibility of a need to reverse because of the error in the punitive damages instruction, indicated a willingness to accept a judgment without the amount awarded by the jury for punitive damages

instead of a new trial. We also believe \$60,000 is fair compensation for the injuries the plaintiff received.³

However, since counsel has not had an opportunity to consult with his client on this issue, the plaintiff should be given the option to have a new trial. Therefore, the order of this court is to remand to the district court for entry of judgment in the amount of \$60,000 unless the plaintiff files with the district court a notice that she rejects the judgment in her favor in the amount of

³This court realizes that the primary purpose of punitive damages is to deter future violations and not to compensate the victim. However, any litigation involves transaction costs. The costs are not limited to the monetary costs of the litigation, but also include the toll the litigation takes on the plaintiff and the community. Our statement to the effect that we believe \$60,000 adequately compensates the plaintiff for her injuries merely reflects our awareness that the plaintiff is in the best position to judge whether a potential punitive damages award is worth the ordeal of a new trial. If she determines that under the present circumstances of her case, the transaction costs are too high, she should not be forced into enduring a new trial merely for the purpose of exacting vengeance on the wrongdoers.

\$60,000 and demands a new trial. If she does file such a notice, a new trial shall be ordered on the punitive damages issue only. Since the finding of liability and the award of compensatory damages are in no way intermingled with the improper punitive damages instruction, it would be unfair to force the plaintiff to reargue her entire claim before a second jury. Devine v. Patteson, 242 F.2d 828, 832-33 (6th Cir.), cert. denied, 355 U.S. 821 (1957).

Accordingly, the judgment as to punitive damages is reversed. The judgment in all other respects is affirmed.

Contie, Circuit Judge, concurring: I concur in the result reached by the majority, but feel the need to express my opinion regarding the majority's application of the remittitur doctrine.

When a federal court concludes that a damage award is excessive, it may use a remittitur as an alternative to ordering a new trial. Flame Coal Co. v. United Mine Workers of America, 303 F.2d 39, 47 (6th Cir.), cert. denied, 371 U.S. 891 (1962). When properly applied, the remittitur doctrine can aid in the conservation of judicial resources and the reduction of legal costs for the parties. Accordingly, the remittitur doctrine has been used when the evidence in the record does not support a particular damage award, Wheatley v. Ford, 679 F.2d 1037, 1040-41 (2d Cir. 1982); Carlton v. H. C. Price Co., 640 F.2d 573, 582 (5th Cir. 1981); Flame Coal Co. v. United Mine Workers of America, 303 F.2d at 46-47, or when the jury's "error or oversight is patent and the correction mechanical." Shingleton v. Armour Velvet Corp., 621 F.2d 180, 182 (5th Cir. 1980).

In this case, the majority orders "a remand to the district court for entry of judgment in the amount of \$60,000 unless the plaintiff files with the district court a notice that she rejects the judgment in her favor in the amount of

\$60,000 and demands a new trial." The majority does not, however, arrive at this decision by carefully examining the evidence and concluding that the jury's punitive damage award is excessive. Indeed, a properly-charged jury has never decided the issue of punitive damages. Nevertheless, the majority justifies the remittitur on the basis of: (1) a statement attributed to plaintiff's counsel in which he "indicated a willingness" to accept the remittitur, and (2) an observation that the \$60,000 actual damage award is "fair compensation" for plaintiff's injuries. That the majority may have correctly assessed the fair amount of compensation in this case does not legitimize its attempt to use the remittitur doctrine to further its own conclusion that the plaintiff is not entitled to punitive damages. This is an issue which a properly-charged jury should resolve.

I also believe that the majority's application of the remittitur doctrine is completely unnecessary in this case. The majority has purportedly given the plaintiff the "option" of accepting the remittitur. The plaintiff, however, already has the option of walking away with her compensatory damage award and thus not pursuing her punitive damage claim at a second trial. Indeed, by correctly limiting the new trial to the

issue of punitive damages, Devine v. Patteson, 242 F.2d 828, 832-33 (6th Cir.), cert. denied, 355 U.S. 821 (1957), the majority has eliminated any risk to the plaintiff should she refuse to accept the remittitur. In my view, the case should simply be remanded to the district court for a new trial on the issue of punitive damages, and the remittitur doctrine should not be involved.

B-1
APPENDIX B

No 81-5737

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DEBRA P. GRIMM,)
)
 Plaintiff-Appellee,) Order Granting
) Petition for
 v.) Rehearing
)
 Q. V. LEINART and)
 ERNEST F. PHILLIPS,)
)
 Defendants-)
 Appellants)

BEFORE: KEITH and CONTIE, Circuit Judges
and JOINER.*

Upon consideration of the petition
for rehearing, the above panel concludes
that rehearing is necessary to consider
the effect of the United States Supreme

*Hon. Charles W. Joiner, U.S. District
Judge, Eastern District of Michigan,
sitting by designation.

Grimm v. Leinart, et al No. 81-5737
Court's opinion in Smith v. Wade, 51
U.S.L.W. 4407 (April 20, 1983) on the
holding in this case.

Accordingly, it is hereby ordered
that the petition for rehearing is
granted. It is further ordered that both
parties file with the court within fifteen
(15) days a supplemental memorandum of law
discussing the district court's charge to
the jury on punitive damages in light of
Smith v. Wade.

ENTERED BY ORDER OF THE COURT

Clerk

C-1
APPENDIX C

No. 81-5737

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DEBRA P. GRIMM,)
)
Plaintiff-Appellee,)
)
v.) O R D E R
)
Q. V. LEINART and)
ERNEST F. PHILLIPS,)
)
Defendants-)
Appellants)

The opinion of the Court decided and
filed April 19, 1983 is hereby amended as
follows:

The paragraph beginning ten lines
from the bottom of page 6 of the slip
opinion and ending on the fifth line of

page 7 is deleted in its entirety, and in its place is inserted the following:

"The district court's instruction properly states the defendants' conduct must be willful in order to justify the assessment of punitive damages. However, the instruction does not inform the jury of the standard for punitive damages as recently pronounced by the Supreme Court in Smith v. Wade, 51 U.S.L.W. 4407, ____ U.S. ____ (1983).¹ In Wade, the Supreme Court held that punitive damages could be assessed against a defendant in a §1983 action where that defendant acts with "reckless or callous indifference to the federally protected rights of others." The

¹Smith v. Wade was decided after the trial was completed in this case.

No. 81-5737

Grimm v. Leinart, et al

standard articulated in Wade does not require a finding of an intentional deprivation of a federally protected right. Instead, a high degree of negligence which the law characterizes as "reckless" may also be sufficient to assess punitive damages against a §1983 defendant.

In reviewing the district court's punitive damage instruction, we find it erroneous. At an early point in the instruction, the district court judge stated, "punitive damages are allowed where the conduct of the defendant shows a disregard for the rights of the person injured" (emphasis added). This statement is clearly incorrect since Wade requires a reckless or callous disregard of the

plaintiff's rights. Hence, the district court's instruction incorrectly states a significantly lower standard of negligence than is required by Wade.

The district court's instruction also incorrectly states that:

In order to allow punitive damages, the acts of the defendant must be intentional and willful, and not just negligently. Must be more than negligence to justify punitive damages (emphasis added).

This statement is also incorrect because it states that there must be an intentional and willful deprivation by the defendant in order to award the plaintiff punitive damages. The Supreme Court expressly stated in Wade that it is unnecessary that a §1983 defendant act intentionally. A showing of reckless

No. 81-5737

Grimm v. Leinart, et al

conduct is sufficient to support an award of punitive damages.

In order to comply with the Wade standard, the district court should instruct the jury that it may award punitive damages if it finds that the defendant willfully and intentionally deprived the plaintiff of his federally protected rights or if the defendant engaged in conduct that exhibited a reckless or callous disregard of the plaintiff's rights. The punitive damage instruction previously given by the district court failed to meet the appropriate standard. Accordingly, we reverse the award of punitive damages."

In all other respects the opinion remains unchanged.

Grimm v. Leinart, et al

No. 81-5737

It is so ORDERED.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk

D-1
APPENDIX D

In The
UNITED STATES COURT OF APPEALS
For the Sixth Circuit

NO. 81-5737

DEBRA P. GRIMM,
Plaintiff-Appellee,

v.

Q. V. LEINART and ERNEST F. PHILLIPS,
Defendants-Appellants.

On Appeal from the United States District Court, Eastern District of Tennessee, Northern Division
Civil Action No. 3-81-212

JOINT APPENDIX

211a

Jury Charge

[259]

MR. MONCIER: Did you intend to instruct on punitive damages?

THE COURT: Didn't I? I thought I did.

Well, if you don't allow compensatory damages, then, of course, you can't allow punitive damages. But, if you allow compensatory damages, then, you may allow punitive damages if you feel the evidence justifies punitive damages.

[260]

Now, punitive damages are allowed where the conduct of the defendant shows a disregard for the rights of the person injured, or the plaintiff.

In order to allow punitive damages, the acts of the defendant must be intentional and willful, and not just negligently. Must be more than negligence in order to justify punitive damages.

212a

Objections to Jury Charge

But, if you find that the defendants acted willfully, and intentionally, and thereby deprived plaintiff of her rights

-- civil rights, then you may -- you don't have to -- allow punitive damages in addition to the civil damages.

Now, does either side want me to excuse the jury while I call for objections or --

MR. MONCIER: The plaintiff does not, Your Honor.

MR. VETTORI: Your Honor, I don't think we need to excuse the jury. We might approach the bench on a matter.

THE COURT: All right.

(Discussion at the bench among court and counsel out of the presence of the jury as follows:)

MR. VETTORI: For the defendants, we would interpose an objection to the definition of punitive damages,

[261]

because I believe it is exactly the same definition that is given for compensatory damages in a civil rights case, that it takes an intentional act.

THE COURT: Didn't I say it takes an intentional act?

MR. VETTORI: You said that, but also what it takes to violate the civil

rights, I think it takes something greater.

THE COURT: Didn't I say willfulness and intentional?

MR. VETTORI: I think it has to be malicious and intentional and willful, Your Honor, I submit.

THE COURT: I had the charge in here but I lost it, on punitive damages. I don't know what I did with it. I believe that will -- do you have any doubts but what that charge --

MR. MONCIER: I thought it was great, Your Honor.

THE COURT: I did, too.

MR. VETTORI: That is all -- we note our objection,

213a
Jury Charge

and that is all we can do. Thank you.

(Thereupon, the above conference at the bench was concluded and the following proceedings were had in open court:)